

ESA and the Alaska Roadless Rule related to the Tongass National Forest

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By: Robert Skorkowsky, US Forest Service, Alaska Regional Office

File: Project Administrative Record for the Rulemaking for Alaska Roadless Areas FEIS

RE: Endangered Species Act determination for the ‘Rulemaking for Alaska Roadless Areas’

This memorandum addresses the US Forest Service’s determination set forth in the Final Environmental Impact Statement (FEIS) that the Alaska Roadless Rule has no effect on species listed under the Endangered Species Act (ESA) or their designated critical habitat. The Forest Service’s ESA determination is based on and informed by documentation related to threatened and endangered species and designated critical habitat, prior ESA analyses and determinations for the 2016 Forest Plan amendment, analysis in the rulemaking FEIS and administrative record, public comments on the rulemaking DEIS, and communications with the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) regarding the rulemaking analysis and ESA listed species and designated critical habitat. This memorandum documents the Forest Service’s ESA determination and expands on the relationship (or lack thereof) between the Rulemaking for Alaska Roadless Areas and effects to ESA listed species and critical habitat.

Under Section 7(a)(2) of the ESA, Federal agencies must ensure that actions they authorize, fund, or carry out are “not likely to jeopardize the continued existence” of any Federally listed threatened or endangered species or result in the destruction or adverse modification of the designated critical habitat of these species. 16 U.S.C. § 1536(a)(2). In general, if a Federal agency determines that an agency action may affect a listed species or designated critical habitat, it must initiate consultation with the appropriate Service—FWS and/or NMFS, depending on the species involved. If the action agency determines that its action will have no effect on a listed species or designated critical habitat, the ESA section 7(a)(2) consultation obligations are not triggered. The Federal agency taking action evaluates the possible effects of its action and determines whether to initiate consultation. 50 C.F.R. §§ 402.14(a), 402.17(c).

The ESA regulations define “effects of the action” to include “all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur.” 50 C.F.R. § 402.02. In this context, “‘but for’ causation means that the consequence in question would not occur if the proposed action did not go forward.”¹ In other words, as relevant here, if the agency does not issue a decision to implement an action alternative associated with a proposed action

¹ 84 FR at 44977.

“and the activity and associated effects to listed species would still occur, there is no ‘but for’ causation. In that event, the activity would not be considered an effect of the action under consultation.” 84 FR 44976, 44977 (Aug. 27, 2019); 50 C.F.R. § 402.17(b). Likewise, the regulations identify remoteness in time, geography, and the causal chain as factors to be considered in assessing whether a consequence is “reasonably certain to occur.” 50 C.F.R. § 402.17. If the consequence is “not reasonably certain to occur”, it is not an “effect of the proposed action” and does not trigger the consultation requirement.²

For the action alternatives associated with the Rulemaking for Alaska Roadless Areas EIS, the action alternatives described are not the source of causation of potential affects to threatened or endangered species, for several reasons:

First, the proposed federal action and the adoption of any of the alternatives associated with this rulemaking analysis do not authorize or require any subsequent on-the-ground management that could potentially affect ESA listed species or resources. None of the action alternatives described in the FEIS authorize any ground-disturbing actions nor do those regulatory options dictate the timing, location or duration of any future actions. To the contrary, any decisions that follow a change to the application of the 2001 Roadless Rule’s prohibitions on the Tongass NF would concern specific management proposals that may eventually occur on lands formerly designated as roadless (including details on how, when, and where to conduct forest management actions including building roads, harvesting timber, or engaging in other near-shore or upslope activities associated with land management). These decisions would be made through subsequent site-specific level of decision-making after additional NEPA analysis and ESA consultation (if the action may affect listed species or critical habitat). The decisions also would occur within the framework of existing forest management goals and objectives, standards and guidelines, as outlined in the amended Tongass LMRP, because the Forest Plan is the programmatic document that sets the framework for how the National Forest will be managed.³ Thus, it is too attenuated

² The Services revised the ESA regulations in 2019. 84 FR 44976 (Aug. 27, 2019). For the definition of “effects of the action,” the Services do not consider the current regulatory inquiry to be a change to their longstanding interpretation and application of the ESA. 84 FR at 44977 (“As discussed in the proposed rule, the Services have applied the ‘but for’ test to determine causation for decades. That is, we have looked at the consequences of an action and used the causation standard of ‘but for’ plus an element of foreseeability (i.e., reasonably certain to occur) to determine whether the consequence was caused by the action under consultation.”). For these reasons, we believe the “no effect” analysis and conclusion set forth here would be the same under either the current or prior ESA regulations.

³ Similarly, re-initiation of consultation on the Tongass Forest Plan, as amended, is not required as the action alternatives do not implicate the reinitiation criteria set out in 50 CFR 402.16. The regulatory change and the administrative change instruction do not present a modification or new information concerning effects in a manner or to an extent not previously considered that causes an effect not previously considered during the ESA consultations for the 2016 Forest Plan amendment. In amending the Tongass Forest Plan in 2016, the Forest Service consulted the NMFS, who concurred that the Forest Plan amendment was not likely to adversely affect ESA-listed species or designated critical habitat. (NOAA-NMFS, AKR-2016-9574, 2016). The Forest Plan, as amended, established a framework for managing the Tongass NF, including implementation direction and goals and objectives related to planned or desired outputs (timber and other program management goals). That informal consultation remains the baseline for consideration of potential effects of action for subsequent consultation efforts. This environmental baseline is used to compare the

to attribute future actions or decisions implementing site-specific actions in the Tongass NF to one of the action alternatives.

Second, we recognize that a future site-specific timber or other project could potentially occur in a newly available area because a decision adopting a rulemaking alternative can influence ‘where’ a project may be authorized or implemented. A rulemaking decision, however, is not expected to materially increase the areas where timber management may occur or the extent of road construction over the next 100 years. Further, in order for consequences of other activities caused by a proposed action to be considered effects of the action, both those activities and the consequences of those activities must satisfy 50 CFR 402.17’s two-part test: they would not occur but for the proposed action and are reasonably certain to occur. The Service agencies have noted that “[e]ach consultation will have its own set of evaluations and will depend on the underlying factors unique to that consultation” and “there are situations, such as when consequences are so remote in time or location, or are only reached following a lengthy causal chain of events, that the consequences would not be considered reasonably certain to occur.” 84 FR at 44981. Under the preferred alternative, we estimate that although approximately 9.4 million acres would no longer be subject to the 2001 Roadless Rule, only about 188,000 more acres would be added to the suitable timber base and become technically available for timber management (FEIS 2-16). Associated road construction is estimated to increase Tongass-wide from 1,000 miles in the no action alternative to approximately 1,045 miles in the preferred alternative over the next 100 years (FEIS 2-24). And, importantly, factors other than a roadless rule decision influence the number and location of site-specific projects occurring on the Forest including: the project purpose and need, forest stand management objectives and existing stand conditions, topography; and resource concerns such as presence of cultural resource sites and traditional uses of lands, recreational uses of the National Forest, and factors such as proximity to anadromous rivers or streams. A decision adopting a rulemaking alternative therefore is not likely to increase or expand timber harvest actions or roadbuilding to an extent that is relevant for ESA listed species or critical habitat.

Third, while a rulemaking decision has the potential to result in a project being implemented in areas formerly designated as roadless areas⁴, we do not have evidence that the location where a timber or road construction project could be implemented as a result of a rulemaking decision may affect ESA-listed species or critical habitat. The Forest Service requested lists of threatened and endangered species from both FWS and NOAA (USDI FWS 07CAAN00-2020-SLI-0336 07-23-2020, USDI NOAA-NMFS email to USFS Don Martin on 07-23-2020) and considered each of these species in the analysis for the Rulemaking FEIS. In relation to the Tongass National Forest, ESA listed species are almost exclusively associated within the offshore marine

condition of the species and the designated critical habitat in the action area with and without the effects of the proposed action. Here the Forest Service has found the action alternatives will not result in a material increase in Forest projects or change how future projects are authorized or implemented following a roadless rule decision including timber management or other program outputs. Thus, there are no additional effects not previously considered during the 2016 informal consultation.

⁴ See FEIS discussion estimating where old growth would be most likely to be harvested within the suitable acreage over the next 100 years. FEIS 3-4 to 3-5, 3-171 to 176

environment adjacent to the National Forest (FEIS 3-13, 3-112). Listed species including fish (FEIS 3-133 to 134, 3-140), marine mammals (FEIS 3-90 to 94, 3-113), sea turtles (FEIS 3-92) and the short-tailed albatross (FEIS 3-91, 3-113) will occasionally migrate through and into the marine and estuary waters off the coast of SE Alaska as they feed along migration routes and with seasonal movements. But there are generally no ESA listed threatened or endangered species that occupy the terrestrial or aquatic ecosystems systems managed by the Tongass National Forest.⁵

There are only limited ways in which timber harvest and Forest management activities on the Tongass National Forest could affect ESA-listed species associated with the surrounding marine environment. As described in the 2016 biological evaluation and assessment (Bennetsen 2016 24-29) for the Tongass Plan amendment and as addressed in the analysis and record for the Rulemaking FEIS (FEIS 3-112 to 113, 3-140), the ways that a site-specific project could potentially affect ESA-listed species or resources depends less on the location of an activity within the National Forest and more on *how* a timber harvest or other activity is authorized and implemented and any resulting potential for indirect effects of the activity influencing the offshore marine environment (Bennetsen 2016 at 28-29). For example, timber harvest on the surface of NFS lands has no direct effects to marine mammals, but there remains a remote potential for indirect effects. For example, a barge moving logs previously harvested from the National Forest could potentially strike an ESA listed marine mammal. Ship strikes are very uncommon (Bennetsen 2016 at 28) but have happened with cruise ships and fishing vessels which is why the determination for the 2016 plan amendment was “may affect, ***not likely*** to adversely affect” (Bennetsen, 2016 at 28-29). Other indirect effects described in the 2016 BE/BA was the potential to affect marine water quality (2016 BE at 29), however it is extraordinarily unlikely that management related sediment would have any measurable effect to the marine environment such that an ESA listed fish species would be affected given project design criteria, BMP’s and forest plan direction designed to reduce the potential for such potential indirect effects, as such the determination for endangered fishes for the 2016 plan amendment was “may affect, ***not likely*** to adversely affect” (Bennetsen, 2016 at 29-30; 2016 Forest Plan Amendment – direction for water quality). Furthermore natural sediment sources and daily tidal exchanges can be tremendous in some areas in coastal Alaska due to glacial river systems and these have been shown to drive marine productivity in areas (Christensen et al 2000, <https://pwssc.org/ecology-of-the-copper-river-delta/>).

The preferred alternative does not alter how projects are implemented or otherwise create new pathways for forest management activities to affect ESA-listed species or critical habitat.

⁵ There are a few isolated locations on the Tongass National Forest used by Steller sea lions associated with the western DPS of the species. These areas include approximately 11 major haul-out areas and three rookeries used for rearing young. The isolated sites adjacent to the marine environment are designated critical habitat which occur on both state managed tidelands and may extend inland onto NFS lands managed by the Tongass National Forest, depending on the site. While portions of these areas do include some lands designated as roadless under the 2001 Rule, the designated critical habitat areas for the Steller sea lion does not include any suitable timber management areas on the Tongass National Forest or areas that would be added to the suitable timber base as a result of implementing an Alaska-specific roadless rule (USFS email J.Foss 8/7/2020 and associated GIS analysis summary file 20200806_StellerCriticalHabitatAnalysis.xlsx).

Instead, such factors are governed by the amended Forest Plan, which continues to govern future projects and activities with or without a regulatory decision changing the prohibitions set forth in the 2001 Roadless Rule on the Tongass National Forest in Alaska. The amended Forest Plan, along with existing laws (ESA and MMPA), regulations, and agency policies, provide a comprehensive framework and process to ensure the continued protection and conservation of ESA listed species and resources. As applied to future project development these measures will continue to eliminate and/or minimize the potential for any adverse effects to listed species and designated critical habitats and remain unchanged by any decision related to the Rulemaking for Alaska Roadless Areas. Thus, the location of a forest management action on the Tongass National Forest either in roadless or outside of roadless has no direct or meaningful bearing on effects to ESA listed species associated with the marine environment.

Fourth, we do not have any basis to attribute future impacts of future projects to a roadless rule decision because we lack information regarding any potential future site-specific project that would occur because of a roadless rule decision (including details on: timing, locations, geographic constraints, and other issues which may exist but are not known at this time). We therefore have no basis to attribute any future impacts to ESA-listed species or designated critical habitat to a roadless rule decision, as the future impacts are too uncertain and attenuated to constitute effects of the roadless rule decision. The possibility of a listed species or designated critical habitat being affected by a potential future project implemented in a formerly roadless area as a result of the roadless rule decision is so remote that it cannot be considered a consequence of a roadless rule decision given: the absence of listed species associated with the terrestrial environment or freshwater ecosystems occurring within the Tongass National Forest boundaries, the concurrence from NMFS that implementation of existing forest management strategies, which set the sideboards for potential effects, are *not likely* to adversely affect ESA listed species or resources (NOAA NMFS AKR-2016-9574), the relatively small quantity of new areas that may become available for timber management or road construction as a result of a rulemaking decision, and the fact that a rulemaking decision does not otherwise control how projects are authorized or implemented.⁶

In the rulemaking's National Environmental Policy Act analysis, the Forest Service thoroughly analyzed the effects of its proposed actions on environmental resources, including federally listed threatened and endangered species. The Forest Service considered the presence (or absence) of ESA-listed species in areas affected by the proposed action, the relationship of the proposed actions to the Forest Service's 2016 Forest Plan, the science and information on how the action could affect ESA-listed species, and the existence of alternative actions and the effects of those actions on ESA-listed species (FEIS, pp 3-13; 3-90 to 3-94; 3-112 to 3-113; 3-133 to 3-134; 3-140).⁷ The Forest Service requested lists of threatened and endangered species from both

⁶ See 50 CFR 402.17(b) ("A conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available."); *Ground Zero Center for Non-Violent Action v. U.S. Dept. of Navy*, 383 F.3d 1082 (2004).

⁷ "The ESA regulations permit ESA biological assessment procedures to be satisfied through inclusion in corresponding NEPA documents. [16 U.S.C. § 1536\(c\)\(1\)](#) The biological assessment required by Section 7 of the ESA "may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of

NMFS and FWS and considered those species in the analysis (USDI FWS 07CAAN00-2020-SLI-0336 07-23-2020, USDI NOAA-NMFS email to USFS Don Martin on 07-23-2020). The Forest Service also considered public comments on the proposed action, including any comments addressing the effects of the proposed action to ESA-listed species. Based on all of the foregoing information and analysis, as well as the obligations under the ESA and applicable regulations, the Forest Service has determined that exempting the Tongass National Forest from the 2001 Roadless Area Conservation Rule, or selection of any rulemaking action alternative, would have “no effect” on listed species or designated critical habitat and as a result, neither informal or formal ESA consultation with the FWS or NOAA is needed (USFS email 3/27/2020). This conclusion has been discussed with both FWS and NMFS and neither agency disagreed or concluded that consultation was required to evaluate possible effects to ESA-listed species or critical habitat. (USFS email 3/27/2020; USFS email 7/23/2020, USFS call with NOAA 8/11/2020 and follow-up email thread 8/11-8/13 2020).

Evaluation of and Response to Comments:

In reaching a no effect finding, we considered all the information and scientific data and analysis regarding listed species provided to us during the DEIS comment period. Several comments are particularly noteworthy. First, an erroneous statement concerning the preparation of a biological assessment for this action was identified in the DEIS (p 3-117) during the comment period. As noted in the response to comments (See: Appendix H - Response to comment 195 and 196), we now correct this error in the final environmental impacts statement by indicating that no biological assessment is required as there is no effect on any listed species. See discussion in footnote 6 for additional information.

We reviewed the incoming public comment and the assumptions that underlie the statements submitted to the agency and provided the following responses.

Comment 195: Commenters were concerned that the proposed rule would violate the Endangered Species Act (ESA) for various ESA listed species such as the marbled murrelet, short tailed albatross, humpback whale, and Eskimo curlew. Commenters asked that the EIS identify all the listed species that may be present and affected in the action areas and questioned findings showing minimal consequences on the survival of the species as well as the lack of a biological assessment.

Response 195: The Forest Service requested lists of threatened and endangered species from both NOAA and FWS and considered these species in the analysis. These T&E species are identified in the wildlife and fish sections of the EIS and included in the project record (FEIS 3-91 to 92 and 3-133 to 134). The analysis presented in the FEIS and project record clarifies the findings related to anticipated effects to threatened or endangered species and clarifies that due to

the National Environmental Policy Act”; 50 C.F.R. § 402.06. The relevant portions of the FEIS and supporting record also serve as the ESA biological assessment, to the extent a biological assessment is legally required. This is also in keeping with CEQ’s longstanding goal of avoiding duplicative environmental analyses and paperwork.

the determination of ‘no effect’ for threatened and endangered species that consultation is not necessary.

Comment 196: The DEIS does not discuss the impact of environmental issues that it claims to address and instead references the 2016 Tongass Forest Plan Amendment EIS. The DEIS must be changed to discuss significant environmental impacts rather than simply incorporating them by reference. The majority of this DEIS relies on the biological assessments (BA) conducted by the National Marine Fisheries Service (NOAA) for the 2016 Forest Plan. However, the new Forest Service plan is fundamentally different to that introduced in 2016. The new plan aims to open areas for logging that will no longer be protected by the Roadless rule.

Response 196: The Alaska Roadless Rule EIS extensively addresses the effects of the proposed action and the alternatives on the environmental issues. It does reference the 2016 Forest Plan Amendment EIS, where appropriate. However, the FEIS for the Alaska Roadless Rule, more extensively quantifies the effects of the alternatives by conducting new analyses of effects and presenting many new tables documenting baseline conditions and effects.

Effects to listed wildlife and fish were considered in the 2016 Forest Plan Amendment FEIS, which included preparing a biological assessment and informal consultation and NMFS concurrence with effects determination that the selected Forest Plan’s management regime would not adversely affect listed species or critical habitat. That consultation established the baseline of effects to be considered in subsequent consultations. The biological analysis for the Alaska Roadless Rule Final EIS also includes a separate analysis for threatened and endangered species, however developing a biological assessment for NOAA-NMFS/FWS or engaging in informal consultation with NOAA-NMFS/FWS was not necessary since it was determined that a decision regarding an action alternative on the roadless rule would have no effect to listed species or designated critical habitat and the FEIS itself is the functional equivalent of a biological assessment.

Reference materials:

USFS email Skorkowsky and USFWS from 03-27-2020



20200327_emailSkorkowsky_USFWS.pdf

USFS email Skorkowsky & Martin re: NMFS call from 07-23-2020



20200723_email_skorkowsky_and_martin.pdf

USFS email/call Skorkowsky and NFMS thread 8/11-8/13 2020



20200811-13_skorkowsky_call_and_email_thread.pdf

FWS Species List: USDI FWS 07CAAN00-2020-SLI-0336 07-23-2020



USDI FWS
07CAAN00-2020-SLI-C

NMFS Species List: 07232020 comm. with Martin & NMFS



07232020 email
D.Martin-NMFS TE list



USFS-species-list_072
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Bennetsen 2016; Biological Evaluation - 2016 Tongass Forest Plan Amendment:



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e_BE.pdf

USFS email Foss to R. Skorkowsky Steller sea lion critical habitat analysis:



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J.Foss-r.skorkowsky st

USFS email Skorkowsky to NMFS re Steller sea lion DCH:



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skorkowsky-NMFS ste



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alHabitatAnalysis.xlsx



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ernDPSCriticalHabitat.



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